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IN THE

Supreme Court of the United States

OCTOBER TERM 1946.

No. 269

HENRY A. GARDNER, TRUSTEE OF THE ALTON RAILROAD COMPANY,

Petitioner,

vs.

FLORENCE GRISWOLD, ADMINISTRATRIX OF THE ESTATE OF LOYAL S. GRISWOLD, DECEASED,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Summary of Argument.

The only questions presented were questions of fact which were decided by the jury. There was evidence that the defendant negligently permitted a cut of cars to be moved through a switch yard in the night-time without warning to the deceased who was at his proper place of employment adjacent to said track. There was evidence that the defendant negligently failed to give the deceased the customary warning of the approach of the cars on the track next to where he was working. There was also evidence of negligence that the defendant failed to comply with the rules which required the defendant to place a white light upon the leading car being pushed through the yard in the night-time. The rule in the Federal Court is that ordinarily the appellate courts do not review the verdicts of juries, but only the acts of the judge. The trial judge alone has the right and duty to set aside the verdict.

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FLORENCE GRISWOLD, ADMINISTRATRIX OF THE ESTATE OF LOYAL S. GRISWOLD, DECEASED,

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REASONS FOR NOT ALLOWING WRIT OF CERTIORARI.

The Pertinent Facts.

Plaintiff's deceased, Griswold, was head brakeman on defendant's train which had been made up and was about to pull out of the switch yard at Bloomington, Illinois. The yard consisted of about 15 parallel tracks running north and south. Train No. 93, consisting of about 54 cars, was standing on track 7 headed south (Tr. 9). The engine was attached to the south end of the train, the caboose at the north end, the air was connected and inspected and the train was about ready to leave (Tr. 11, 17).

It was the duty of the conductor to check the cars in the train, which he did commencing at the head end walking to the rear end (Tr. 17). The accident occurred at 3:40 A. M. January 25, 1943 (Tr. 11). It was dark (Tr. 40). The conductor carried a lantern and could be seen walking along the side of the train between tracks 6 and 7 making his check (Tr. 17). There were a number of other employees working on the train between tracks 6 and 7 who also carried lanterns (Tr. 17) and it was necessary but difficult to follow the conductor's lantern and distinguish it from the lanterns carried by the other men (Tr. 25). A signal was momentarily expected from the conductor to pull out and, therefore, it was the duty of the engineer, the fireman and Griswold to watch carefully along the train between tracks 6 and 7 for the conductor's signal and not to be confused by a signal given by any other workman (Tr. 25).

Griswold was required to ride on the head end of the train (Tr. 11). He had to be near the engine at the time of the accident in order to take his place when the train pulled out. He had the privilege of riding either in the cab of the locomotive or in the cupola, a compartment in the back of the tender (Tr. 11). It was customary and proper for Griswold, together with the engineer and fireman to look for the signal from the conductor (Tr. 25). Inasmuch as the conductor was between tracks 6 and 7, it was proper for Griswold to be on the ground between tracks 6 and 7 to look out for his signal and to be ready to get upon the engine when it started out.

While the engine was standing there, Griswold went down the steps from the cab to the space between tracks 6 and 7 (Tr. 26). Immediately thereafter, the defendant railroad company caused a long cut of freight cars to be backed in a northerly direction on track 6 moving slowly and silently (Tr. 34) and without a light or signal or a man riding on

the leading end thereof (Tr. 22, 43). The engineer and fireman on the locomotive had no notice of the approach of these cars and did not learn of the movement of those cars past the locomotive until they heard them going by (Tr. 21). As the first car of this cut went by the engine, the engineer saw the flash of a lantern (Tr. 23) which was presumably from Griswold's lantern when he was struck by the first car. His body was found badly mangled several hundred feet to the north (Tr. 37).

Negligence Charged.

The complaint charged defendant with the following acts of negligence: (a) The defendant negligently caused, permitted and allowed said cars to strike against Griswold. (b) The defendant negligently failed to give Griswold suitable, sufficient and proper notice, signal and warning of the approach of the cars on track 6. (c) The defendant negligently caused said cars to be propelled on track 6 without lights or signal on the leading end thereof (Tr. 2, 3).

Questions of Fact Decided by the Jury.

(A) Griswold being the head brakeman was required to ride on the locomotive or tender when the train was in motion (Tr. 11). He had to be either on or near the engine at the time he was killed in order to get upon it when it pulled out. In other words, he was at a place where he had to be. It was Griswold's duty, together with the engineer and fireman, to look out for the starting signal presently expected from the conductor (Tr. 25). Presumably Griswold descended from the engine to the space between tracks 6 and 7 to better look for the conductor's signal.

Tracks 6 and 7 were 8½ feet apart (Tr. 13). The over-

hang of freight cars is 27 inches (Tr. 13). Therefore, the available space between cars standing on tracks 6 and 7 was 4½ feet (Tr. 13).

In addition to the conductor, who was required in the performance of his duties to be between tracks 6 and 7, while checking the cars of his train (Tr. 17) there were at least two car inspectors who were required to work between tracks 6 and 7 checking air brakes and couplings preparatory to the departure of the train (Tr. 17, 25). There were, therefore, four employees who were rightfully in the space between tracks 6 and 7, all of which the railroad company had notice (Tr. 17). Nevertheless, the railroad company caused a long cut of freight cars to be backed slowly and silently in a northerly direction on track 6 without a light or a man on the end of the first car and without taking any precautions to warn or inform any of the four employees between tracks 6 and 7 of the approach of this train (Tr. 43).

The facts in this case are similar to the case of *Tiller* v. *Atlantic Coast Line Railroad Co.*, 318 U. S. 54, 87 L. Ed. 610 where a policeman employed by the railroad company was between two tracks inspecting seals on cars and was killed by cars shunted on an adjacent track in the nighttime without notice or warning to him.

The defendant in the United States Circuit Court of Appeals contended that there was no negligence, relying upon *Aerkfetz* v. *Humphries,* 145 U. S. 418 and *Toledo, St. Louis and Western Railroad Co.* v. *Allen,* 276 U. S. 165. That line of argument now seems to have been abandoned by the defendant.

This case is also similar to the case of *Tennant* v. *P. & P. U. R. Co.,* 321 U. S. 29, 88 L. Ed. 520 where it was charged that the engineer negligently backed an engine and cars

without ringing the bell, the engineer not knowing the precise whereabouts of Tenant. The Court there said:

> "A movement without a warning, was clearly dangerous to life and limb."

It was a question of fact whether the defendant was negligent in causing this cut of cars in the night-time to be moved over track 6 without any light or signal on the end and no warning given to employees whom the railroad had ample notice might be engaged in the performance of their duties between tracks 6 and 7. The space between cars 6 and 7 was very narrow and the railroad company must have known that there was danger in a car being moved in on track 6, striking against an employee between tracks 6 and 7.

(B) It was likewise a question of fact for the jury whether the defendant negligently failed to observe the custom of warning employees of the approach of cars on the adjoining track.

It was the practice to warn and inform employees in exposed places of the movement of the cars. Scharfenberg was a yard switchman who was going to make a coupling between the moving cut of cars and cars already standing on track 6 (Tr. 40). Kettenring, the air inspector had just finished inspecting the cars on track 7 and was writing out his report on the side of one of the cars when Scharfenberg saw the cut without lights approaching. Scharfenberg on previous occasions warned Kettenring of approaching cars under similar circumstances. He testified: "I have on numerous occasions warned him of approaching cars when I would see them, if I had any doubts that they didn't see them coming." (Tr. 44). He said to Kettenring "Look out for the cars on track 6 (Tr. 45)." Scharfenberg further testified: "Well, it is a general practice for us railroad men to be very alert and help others to be alert, and

I called his attention to them especially, I saw his back to the movement that we were making (Tr. 46)." Kettenring testified when asked whether anybody called his attention to those cars "I was pretty close to Scharfenberg when they went by. Well, he did say, like he always says, though, whenever they shove a track to be careful, 'We are shoving track,' so and so, and I always watched more closely than any other (Tr. 56)."

No warning was given Griswold of the approach of the train. In so failing to follow the common practice of warning employees in dangerous positions, the railroad was guilty of negligence.

(C) The evidence showed that the defendant was negligent in not complying with its rules.

The Book of Rules required "When cars are pushed by an engine, except when shifting or making up trains in yards, a white light must be displayed on the front of the leading car by night (Tr. 69)." The engineer (Tr. 21), the fireman (Tr. 37) and Scharfenberg (Tr. 43, 44) all testified that there was no white light displayed on the front end of the leading car. It was a question of fact for the jury whether the failure to display a white light on the leading car was the cause of plaintiff's death. The plaintiff's evidence stood uncontradicted. It was negligence to cause this cut of cars to be moved along track 6 without a white light displayed on the front of the leading car when the railroad company knew that Griswold and other employees were engaged in the performance of their duties between tracks 6 and 7.

Proximate Cause.

Petitioner contends that the negligence of the defendant in failing to warn Griswold of the approach of the cars was not the proximate cause of the accident. In *Tennant v. Peoria & Pekin Railroad Co.*, 321 U. S. 29, the Court held:

> "That was a question of fact for the jury whether the failure to ring a bell before starting a locomotive was negligence."

And so in this case it was a question of fact for the jury whether the failure to give warning to Griswold was the cause of his death.

Given Instructions.

The Trial Court, at the request of the plaintiff, instructed the jury:

> "It was the duty of the employer of the deceased in this case to have used ordinary care and prudence in furnishing to the deceased, at the time of the accident in question, a reasonably safe place in which to work (Tr. 129)."

The instruction was not peremptory and did not direct a verdict. It has always been the law that it is the duty of an employer to exercise ordinary care to furnish his employee a reasonably safe place in which to work. A place to work may be rendered unsafe not only by reason of defects in the place itself, but by the manner in which the employer carries on his work. In the instant case, the moving of cars in the night-time without notice or warning when the employer knew that other employees were engaged in the performance of their work adjacent to said track, made the place which the employer furnished to the employees an unsafe place.

The defendant is not in position to claim that his counsel made a valid objection to the instruction. During the course of the argument before the Court, the Court said:

> "Suppose they operated a train down there in an unsafe manner. Isn't that failure to furnish a safe place to work, so far as the employee is concerned?
>
> "Mr. Moir: That may be. That may be." (Tr. 104).

The defendant did not make a valid objection.

The attention of the Court is directed to *Blair* v. *Baltimore & Ohio R. R. Co.*, 323 U. S. 600, 89 L. Ed. 490, 494, where it appeared that the injury resulted not from a defect in premises but from the way the work was carried on. The Court said:

> "The negligence of the employer may be determined by viewing its conduct as a whole * * * and especially is this true in a case such as this, where the several elements from which negligence might be inferred are so closely interwoven as to form a single pattern, and where each imparts character to the other."

The giving of the instruction could have worked no harm to the defendant. It correctly states the law and is based upon the evidence before the jury. There can be no question that the place where Griswold was required to work was rendered unsafe by the manner in which the defendant conducted its business.

Rule 61 of the Rules of Civil Procedure provides that no defect in any ruling or order of the Court is ground for granting a new trial unless it is inconsistent with substantial justice, and the Court must disregard any error or defect in the proceedings which does not affect the substantial rights of the parties.

Conclusion.

The evidence amply supports the charges of negligence made against the defendant. The questions involved were purely questions of fact which were properly decided by the jury. We urge the Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

ROYAL W. IRWIN,
Attorney for Respondent.